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Supreme Court of the United States

OCTOBER TERM, 1937.

No. _____ Original.

THE STATE OF OKLAHOMA, UPON THE RELATION
OF HOWARD C. JOHNSON, BANK COMMIS-
SIONER, PLAINTIFF,
VS.
R. M. COOK, DEFENDANT.

REPLY AND SUPPLEMENTAL BRIEF OF DEFENDANT,
R. M. COOK, ON RULE TO SHOW CAUSE.

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Huntington vs. Attrill, 146 U. S. 657, 36 L. Ed. 1123	16
Kansas vs. United States, 204 U. S. 331, 51 L. Ed. 510	20
Lankford vs. Platte Iron Works Co., 235 U. S. 461, 59 L. Ed. 316	20
Louisiana vs. Texas, 176 U. S. 1, 16, 44 L. Ed. 347 353	3, 9-10
McClure vs. Campbell, 148 Mo. 96	26
New Hampshire vs. Louisiana, and New York vs. Louisiana, 108 U. S. 76, 27 L. Ed. 656	5, 8, 9, 11, 20
Minnesota vs. Hitchcox, 185 U. S. 383, 46 L. Ed. 954	3
North Dakota vs. Minnesota, 263 U. S. 365, 68 L. Ed. 342	10
Oklahoma vs. Gulf, etc., Ry., 220 U. S. 290, 55 L. Ed. 469	19
Pennsylvania vs. The Wheeling, &c., Bridge Co., 13 How. 559 (14 How. 545, 548), 14 L. Ed. 249	12
Richison, Adm'x, vs. State ex rel. Barnett, Bank Com'r, 176 Okla. 537, 56 Pac. (2d) 840	4
South Dakota vs. North Carolina, 192 U. S. 286, 48 L. Ed. 448	9
State ex rel. Mothersead, Bank Com'r, vs. Kelly, 141 Okla. 36, 284 Pac. 65	4
State of Oklahoma vs. Atchison, Topeka and Santa Fe Railway Company, 220 U. S. 277, 55 L. Ed. 465	17
Thompson vs. State ex rel. Bank Commissioner, 119 Okla. 166, 248 Pac. 1110	13
United States vs. Minnesota, 270 U. S. 181, 70 L. Ed. 539	19
United States vs. Texas, 143 U. S. 643, 36 L. Ed. 285	3
United States vs. West Virginia, 295 U. S. 463, 79 L. Ed. 1546	3
Wisconsin vs. Pelican Insurance Co., 127 U. S. 286, 32 L. Ed. 239	15, 23

INDEX

III

CONSTITUTION

Clause 1, Section 2, Article III.....3, 7, 8, 19, 20, 23, 24

STATUTES

Oklahoma Statutes, 1931, Section 9173.....4

Judicial Code, Section 235; 28 U. S. C. A., Sec. 343 24

INDEX

Plaintiff's Two-fold Capacity Relied Upon to Sustain Jurisdiction	2
I. There Must Be a True and Substantial Controversy Between the Plaintiff State and the Defendant Citizen of Another State, in Which the Plaintiff State Is Itself Directly Interested.....	3
II. The State of Oklahoma Has No Direct Property Interest in the Subject Matter of the Controversy	4
III. The Interest of the State of Oklahoma in Enforcing in Its Sovereign Governmental Capacity Its Public Policy With Reference to Protection of Depositors and Creditors of Banks Is Not Such an Interest As Sustains Original Jurisdiction in the Supreme Court.....	11
IV. The Consequences of Sustaining Original Jurisdiction in This Case Make Clear the Fact That It Is Not Such As Was Contemplated in the Framing of the Constitution.....	22

TABLE OF CASES

American Exchange Bank of Henryetta vs. Rowsey, 144 Okla. 172, 289 Pac. 726.....	4
Blackert vs. Langford, Commissioner, 74 Okla. 61, 176 Pac. 532.....	13
Bank vs. Gray, 146 Mo. 568.....	26
Chisholm vs. Georgia, 2 Dall. 419.....	6, 24
Converse vs. Hamilton, 224 U. S. 243, 56 L. Ed. 749	5
Griffin vs. Brewer, 167 Okla. 654, 56 Pac. (2d) 840	4
Helvering vs. Therrill, 82 L. Ed. Adv. Op. 537, 541	4

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To the Honorable Chief Justice, and the Associate
Justices of the Supreme Court of the United States:

In view of "Plaintiff's Reply to Answer to Rule to
Show Cause" filed herein by the attorneys for the plain-
tiff, defendant believes it advisable to file this both as
a reply brief thereto, and also as a supplement to the
somewhat limited legal discussion contained in defend-
ant's "Answer to Rule to Show Cause."

**Plaintiff's two-fold capacity relied upon to
sustain jurisdiction.**

In invoking the original jurisdiction of the Supreme Court of the United States, plaintiff, the State of Oklahoma, upon the relation of Howard C. Johnson, its bank commissioner, relied upon the legal title to the cause of action as being vested in the state pursuant to the provisions of its own laws. Defendant, in his "Answer to Rule to Show Cause" pointed out that the State's ownership was that of a bare trustee vested with legal title, but that the beneficial ownership of the cause of action and of any possible proceeds of recovery thereon belonged exclusively to private interests, namely, the depositors and other creditors of the Osage Bank of Fairfax, Oklahoma; that under no possible circumstances can a single penny of the proceeds of any recovery herein go to or vest beneficially in the State. In short, that the State itself has no property interest involved herein, and there is accordingly no real controversy between the State as such and defendant, a citizen of Missouri.

To meet this contention, plaintiff, in its reply to the answer to the rule to show cause urges the proposition that the State has elected itself to protect the rights and interests of bank depositors as a sovereign governmental function of the State, as a matter of public policy. It accordingly invokes the jurisdiction of this Court in aid of the enforcement of that policy and as an aid to the exercise of this self-assumed function exercised as an attribute of sovereignty. We respectfully submit that this second aspect of the capacity in which plaintiff

sues adds nothing to its right to invoke the original jurisdiction of this Honorable Court.

I.

There must be a true and substantial controversy between the plaintiff State and the defendant citizen of another state, in which the plaintiff State is itself directly interested.

It has been repeatedly ruled by this Court that the requirements of Clause 1 of Section 2 of Article III of the Constitution of the United States are fundamental and paramount to the provisions of Clause 2 of the same section. Clause 1 extends the federal judicial power "to controversies * * * between a state and a citizen of another state * * *." Clause 2 merely distributes or divides the jurisdiction of the Supreme Court as between original and appellate jurisdiction; it does not confer jurisdiction. There must be, in truth and in fact, a real and substantial controversy between a state and a citizen of another state before the case is one for the original jurisdiction of this Court, even though a state be a proper or even a necessary party thereto. *Louisiana v. Texas*, 176 U. S. 1, 16, 44 L. Ed. 347, 353; *Minnesota v. Hitchcox*, 185 U. S. 383, 46 L. Ed. 954; *United States v. Texas*, 143 U. S. 643, 36 L. Ed. 285; *United States v. West Virginia*, 295 U. S. 463, 79 L. Ed. 1546.

II.

The State of Oklahoma has no direct property interest in the subject matter of the controversy.

In our original "Answer to Rule to Show Cause," pages 5-6, we pointed out that all proceeds of the enforcement of a bank stockholder's liability such as that involved herein are to be applied to payment of depositors and creditors of the bank, and that if any excess remains, they shall revert to the stockholders of the bank, Section 9173, Oklahoma Statutes, 1931. The statutory stockholder's liabilities are "designed solely for the benefit of creditors and to constitute a fund available only when the bank is insolvent, and thus unable to meet its liabilities in full * * * it amounts for all practical purposes to a reserve or trust fund * * *" *State ex rel. Mothersead, Bank Com'r, v. Kelly*, 141 Okla. 36, 284 Pac. 65; *American Exchange Bank of Henryetta v. Rowsey*, 144 Okla. 172, 289 Pac. 726; *Griffin v. Brewer*, 167 Okla. 654, 56 Pac. (2d) 840.

The assets of insolvent banking institutions are liquidated "for the benefit of certain members of the public who were depositors in such institutions." *Richison, Adm'r, v. State ex rel. Barnett, Bank Com'r*, 176 Okla. 537, 56 Pac. (2d) 840.

In *Helvering v. Therrill*, 82 L. Ed. Adv. Op. 537, 541, involving the liability of a state bank liquidator to federal income tax, this Court said:

"The compensation of the taxpayers was paid from corporate assets—not from funds belonging to the State. No one of them was an officer of the

State in the strict sense of that term. The business about which they were employed was not one utilized by the State in the discharge of her essential governmental duties. The corporations in liquidation were private enterprises; their funds were the property of private individuals."

True, the bank commissioner as the designated executive officer of the State to enforce the stockholder's liability, is vested with authority greater than that of an ordinary chancery receiver (*Converse v. Hamilton*, 224 U. S. 243, 56 L. Ed. 749) and hence can bring suit in the name of the State in the courts of other jurisdictions to enforce the transitory property right originating in the contract of becoming a stockholder. Viewed in the aspect of collecting or enforcing the property rights of the depositors and creditors of the defunct bank, as stated in *Converse v. Hamilton*, "The case presented was, in substance, that of a trustee clothed with adequate title for the occasion, seeking to enforce for the benefit of his *cestui que trustent* a right of action transitory in character against one who was liable contractually and severally if at all."

But the mere clothing of the State with the legal title as trustee of a cause of action or its proceeds, is not sufficient to constitute a real and substantial controversy directly between the State and the defendant citizen of Missouri.

In the leading cases of *New Hampshire v. Louisiana*, and *New York v. Louisiana*, 108 U. S. 76, 27 L. Ed. 656, the plaintiff states, respectively, had, pursuant to

enactments of their legislatures, been vested with complete legal title to the bonds of the State of Louisiana, but this ownership was that merely of a trustee for the benefit of private individuals who had previously owned them. This Court declined to take original jurisdiction of the controversy. Counsel for plaintiff herein assert, however, that the refusal by this Court to take original jurisdiction was based on the ground that the defendant, State of Louisiana, was a sovereign state which could not be sued without its consent, and that the capacity in which the plaintiff states, New Hampshire and New York, held the bonds was not involved.

On the contrary, this question of capacity in which the plaintiff states held the bonds, was the essential question upon which the result turned. Prior to the adoption of the Eleventh Amendment to the Constitution, under the decision in *Chisholm v. Georgia*, 2 Dall. 419, it was ruled that citizens of another state could sue a state of the Union as defendant in the Supreme Court of the United States. The Eleventh Amendment, remedying this situation, declared that the judicial power of the United States should not extend to suits brought by citizens of another state against one of the United States. It left untouched the jurisdiction of this Court over controversies between states, i. e., when both plaintiff and defendant were states of the Union. Accordingly, if the controversies between New Hampshire and New York on the one hand and Louisiana on the other, were truly controversies between states, the jurisdiction would have been sus-

tained under Section 2 of Article III of the Constitution, and not prohibited by the Eleventh Amendment. The Court held, however, that, in truth and in fact, since the plaintiff states were merely trustees clothed with the legal title to the bonds for the benefit of their individual citizens, the cases filed did not present controversies truly between states and jurisdiction was denied. The Court thus stated the question:

"The real question, therefore, is, whether they can sue in the name of their respective states after getting the consent of the state, or, to put it in another way, whether a state can allow the use of its name in such a suit for the benefit of one of its citizens."

The Court then referred to the contention similar to that made herein, that the plaintiff states, as sovereigns and trustees of their citizens had the right to represent them somewhat in the nature of *parens patriae*, the Court saying:

"It is contended, however, that, notwithstanding the prohibition of the amendment, the states may prosecute the suits, because, as the sovereign and trustee of its citizens, a state is 'Clothed with the right and faculty of making an imperative demand upon another independent state for the payment of debts which it owes to citizens of the former.'"

The Court rejected the contention, pointing out that a cause of action attempted to be asserted by a state for the sole beneficial use of the citizens in respect to their property rights was not the type of controversy between

states contemplated under Section 2 of Article III of the Constitution, and the Court concluded with the following significant language:

“* * * and, in our opinion, one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other state to its citizens.”

If, as the above quotation declares, a state cannot create a controversy between itself and another state within the meaning of the jurisdictional clauses of the Constitution by assuming the prosecution of debts owing by the other state to its citizens, no more can it create a controversy between itself and the citizen of another state by assuming the prosecution of debts owing in truth and in fact to the citizens of the plaintiff State rather than to the State itself.

While the State of Oklahoma is fully empowered to assume by trusteeship the legal title and right to prosecute claims of its citizens, if they see fit to grant it that power, that State cannot by so doing enlarge the constitutionally prescribed jurisdiction of the Supreme Court of the United States. It cannot convert by its own mere legislative enactments what is, in truth and in fact, a claim or cause of action for the benefit solely of its citizens into a controversy with the State itself within the meaning of that phrase as contemplated by the framers of the Constitution.

That the cases of *New Hampshire v. Louisiana* and *New York v. Louisiana* did, in fact, turn upon the ques-

tion of where the beneficial ownership of the bonds lay, as between the plaintiff States and their citizens, is made clear from the ruling of the court in *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. Ed. 448. In that case, in contrast with the New Hampshire and New York cases, the holders of certain bonds issued by Louisiana donated them outright to the State of South Dakota. In such a situation, this Court sustained its original jurisdiction and distinguished the New Hampshire and New York cases, saying:

"Neither can there be any question respecting the title of South Dakota to these bonds. They are not held by the state as representative of individual owners, as in the case of *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. Ed. 656, 2 Sup. Ct. Rep. 176, for they were given outright and absolutely to the state."

It results from these two contrasting decisions that the controversy or cause of action which the plaintiff State is asserting when a state is plaintiff and a citizen of another state is defendant, must be one involving a beneficial property right of the plaintiff State. The state must be vested with the beneficial as well as the legal ownership for the controversy to be one truly between the State and the defendant. Such beneficial ownership of a property interest is entirely lacking in the case at bar.

Of the case of *New Hampshire v. Louisiana*, Mr. Justice Harlan in his separate concurring opinion in *Louisiana v. Texas*, 176 U. S. 1, 1. c. 25, 44 L. Ed. 347, 1. c. 357, said:

"The citizens of the complaining state may, in proper cases, invoke judicial protection of their property rights when assailed by the laws and authorities of another state; but their state cannot, even with their consent, make their case its case and compel the offending state and its authorities to appear as defendants in an action brought in this court. If this be not so, we were wrong in *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. Ed. 656, 2 Sup. Ct. Rep. 176, in which case it was held that one state could not, by taking charge of demands or debts held by its citizens, against another state, acquire the right to bring a suit in its name in this court against the debtor state."

And Mr. Justice Brown in his separate concurring opinion said:

"* * * and while I fully agree that resort cannot be had to this court to vindicate the rights of individual citizens, or any particular number of individuals * * *"

The function of the State relied upon in seeking to enforce the liability involved herein is described as "its lost power" in *North Dakota v. Minnesota*, 263 U. S. 365, 68 L. Ed. 342, where the court said, l. c. 375-376:

"* * * The right of a state as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants, threatened by the proposed or continued action of another state, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state."

If as demonstrated in *New Hampshire v. Louisiana*, and *New York v. Louisiana*, *supra*, the states have by the Eleventh Amendment lost their power to enforce individual claims of their citizens against sister states, because the controversy is not truly one in which the plaintiff State is directly involved, by the same reasoning they never had the right to invoke the original jurisdiction of this Court to enforce such claims since they are likewise not truly or directly involved therein.

III.

The interest of the State of Oklahoma in enforcing in its sovereign governmental capacity its public policy with reference to protection of depositors and creditors of banks is not such an interest as sustains original jurisdiction in the Supreme Court.

In order to escape the barrier to original jurisdiction in the Supreme Court, consisting of lack of beneficial property interest in the controversy, as above demonstrated, counsel for the State of Oklahoma seek to bolster up their claim of jurisdiction by asserting that the State of Oklahoma has a real interest in the controversy separate and distinct from that of the individual depositors and creditors of the bank in that it is a part of its public policy, and, in fact, one of its sovereign functions to protect depositors in banks and creditors thereof from loss. They undertake to demonstrate that the State is exercising an attribute of sovereignty in so doing and they would supply the lack of property interest by invoking a governmental interest. Unfortunately, the stronger they urge and the more successfully they

demonstrate this aspect of the controversy, the more conclusively do they state themselves out of Court on the jurisdictional question.

In *Pennsylvania v. The Wheeling, &c., Bridge Co.*, 13 How. 559, 14 L. Ed. 249, the State of Pennsylvania successfully maintained original proceedings in this Court to enjoin the bridge company from maintaining a bridge across the Ohio River, which interfered with the operation of lines of canal boats and railroads constructed and owned by the State. The original jurisdiction of the Court was challenged by counsel for the defendant on the ground among others that the bill of complaint did not show "a direct and immediate interest in the State of Pennsylvania, in her corporate capacity" (14 How. 1. c. 545); and as stated by the Court (14 How. 1. c. 558) "that the State of Pennsylvania had no corporate capacity to institute this suit in the Supreme Court, to vindicate the rights of her citizens."

In answer to these objections the Court relied on the State's direct property interest in the canal boats and railroads and the tolls therefrom and said:

"In this case the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of a state are adequate to the protection of its own citizens, and no other jurisdiction can be exercised over them, or in their behalf, except in a few specified cases. Nor can the state prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims, not an

abstract right, but a direct interest in the controversy, and that the power of this court can redress its wrongs and save it from irreparable injury. If such a case be made out, the jurisdiction may be sustained."

This assertion of state governmental policy is merely a statement of the motive behind the legislative enactment. Presumably all state enactments are in furtherance of the public policies of the State, both economic and political, but that does not convert a property interest merely of individuals governed or regulated by the enactment into a direct property interest of the State, or one capable of judicial enforcement in the courts of another jurisdiction.

The Supreme Court of Oklahoma has itself expressly stated that this right to enforce stockholders' liability is merely a property right belonging to the creditors of the bank. In *Thompson v. State ex rel. Bank Commissioner*, 119 Okla. 166, 248 Pac. 1110, the Court said, referring to its earlier decision in *Blackert v. Langford, Commissioner*, 74 Okla. 61, 176 Pac. 532:

"There it was held that the stockholders' liability is designed solely for the benefit of the creditors and constitutes a fund available only when the bank is insolvent and unable to meet its obligations in full."

The Court earlier referred to the matter thus:

"* * * the stockholders' double liability, which, as said in *Delano v. Butler*, 118 U. S. 634, 'is limited to an amount equal to the par value of

the stock held and owned by each stockholder, and exists in favor of the creditors collectively, not severally, and in proportion to the amount of their respective claims against the corporation.'"

The right herein sought to be asserted is essentially a pure property right of the creditors of the bank, and it does not change its nature to assert that it was created pursuant to the exercise of the sovereign power of the State to enact the provision, or that it was part of the State's public policy to enforce it.

However, even if it were true that the State has itself assumed an interest in the collection of these claims in some manner distinct from its general political interest in seeing that all its civil as well as its criminal laws are obeyed, it does not result that such interest of the State, assuming it to exist, is one that can be asserted and enforced extraterritorially in the courts of another jurisdiction, be they those of a sister state; or by original proceedings in the Supreme Court of the United States.

Viewed in the aspect of seeking to enforce this public policy, apart from any property interest in the State, the State may be exercising an attribute of sovereignty, but it is fundamental that the exercise of such attributes is and must be confined to the territorial jurisdiction of the sovereign seeking to exercise it. The same principles which deny the right of a state to invoke the jurisdiction of a sister state or the original jurisdiction of the Supreme Court of the United States to enforce its penal laws or other exercises of its police

power, operate to deny it the right to invoke the jurisdiction of other sovereignties to enforce or give effect to this public policy upon which counsel for the State so strongly rely. The case is no different from any other attempt to enforce extraterritorially the State's local, municipal law or police power.

In *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 286, 32 L. Ed. 239, the plaintiff State had obtained a judgment in one of her own courts against the defendant insurance company for the enforcement of a penalty for violation of the State's insurance laws. She, thereupon, sued upon this judgment by original proceeding in the Supreme Court. The Court, in an opinion by Mr. Justice Gray, reviewed exhaustively the previous decisions of the Court and the principles involved in the jurisdictional question and concluded that the jurisdiction did not lie. The Court said, among other things:

"The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all."

This case of *Wisconsin v. Pelican Insurance Co.*, is a much stronger case for the plaintiff than is the case at bar, for the reason that Wisconsin, having reduced her claim to the fine or penalty to a money judgment in her own courts, was vested with a property interest in the cause of action. Nevertheless, the Supreme Court,

relying upon the fundamental principle that the courts of one jurisdiction will not enforce the penal laws or municipal legislation of another state, refused jurisdiction, saying:

"In whatever form the State pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense.

"The court, therefore, cannot entertain an original action to compel the defendant to pay to the State of Wisconsin a sum of money in satisfaction of the judgment for that fine."

Huntington v. Attrill, 146 U. S. 657, 36 L. Ed. 1123, is in no way in conflict with the foregoing proposition. In that case the Supreme Court held it was error for the Court of Appeals of the State of Maryland to refuse to enforce a judgment obtained in the State of New York upon defendant's liability as a director of a New York corporation for having signed a false certificate in violation of a provision of the New York Corporation Law. The judgment was obtained not by the State in original proceedings in the Supreme Court but by an individual in a state court. The character of the liability was held to be remedial for the benefit of creditors of the corporation, and not a penal enactment of the State. In fact the decision sustains our contention that the interest which the plaintiff is seeking to enforce herein is not in fact one in which the State has any direct interest, but is

purely for the benefit of the property interests of its individual citizens.

The State of Oklahoma may adopt and enforce, subject to Federal Constitutional limitations, whatever public policies it sees fit, and enforce them by whatever means and methods she, as a sovereign state, may determine, but it is contrary to all principles of international law to permit her to invoke as of right the jurisdiction of the courts of any other sovereignty to enforce such governmental policies for her.

Squarely in point is the case of *State of Oklahoma v. Atchison, Topeka and Santa Fe Railway Company*, 220 U. S. 277, 55 L. Ed. 465. In this case the State of Oklahoma brought suit by original proceedings in this Court to enjoin the defendant railway from charging rates on domestic shipments greater than those authorized by the State of Kansas. The State claimed that the defendant was operating in violation of a congressional grant which provided that the inhabitants of the Territory of Louisiana should not be charged a greater freight rate than that authorized by the laws of the State of Kansas for similar service, and further alleged "that if the defendant was permitted further to operate the railroad in violation of the congressional grant, it would be a hindrance to the growth of the State as well as an injury to the property rights of the inhabitants." The Court rejected the case as not within its original jurisdiction. The Court first pointed out that the State of Oklahoma was not itself, a shipper of the commodities the rates on which were involved, and had no property interest therein, saying:

"But the state, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates, and to compel the railway company to respect the rights of *all* of the people of Oklahoma who may have occasion to ship such commodities over the railway."

The Court then answered the contention that the State, in its governmental capacity as being concerned with the welfare of its citizens generally might have a sufficient interest by saying:

"These doctrines, we think, control this case, and require its dismissal as not being within the original jurisdiction of the court, as defined by the Constitution. Under a contrary view that jurisdiction could be invoked by a state, bringing an original suit in this court against foreign corporations and citizens of other states, whenever the state thought such corporations and citizens of other states, were acting in violation of its laws to the injury of its people generally or in the aggregate; although an injury in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of states, could be reached, without the intervention of the state, by suits instituted by the persons directly or immediately injured.

"We are of opinion that the words in the Constitution conferring original jurisdiction on this court in a suit 'in which a state shall be a party' are not to be interpreted as conferring such jurisdiction in every cause in which the state elects to make itself strictly

a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or public policy against wrongdoers generally."

See, also, *Oklahoma v. Gulf, etc., Ry.*, 220 U. S. 290, 55 L. Ed. 469.

All the decisions dealing with this matter of stockholders' liability treat it as simply a contractual liability incurred by the act of becoming a stockholder in the corporation. The State itself has no such direct interest in seeing that contracts with its corporations are fulfilled as to constitute a breach of the contract if there be one, a controversy with the State itself within the meaning of Section 2 of Article III of the Constitution.

Counsel for plaintiff herein rely upon *United States v. Minnesota*, 270 U. S. 181, 70 L. Ed. 539. In that case the Court entertained jurisdiction of an original proceeding by the United States against the State of Minnesota to recover lands to which it was alleged the Chippewa Indians were entitled and which Minnesota claimed under illegal patents. The United States occupied the position of a guardian of the Indians, something more than the trusteeship which the State of Oklahoma has assumed for the benefit of its bank depositors and creditors. It was vested with the title before the cause of action arose. In the case at bar the State of Oklahoma had never been vested with the money it seeks to recover from defendant Cook. There was the added feature that the United States had incurred treaty obligations to apply the lands and the proceeds of their sale exclusively to the use, support and civilization of the

Indians, an obligation incurred before the issuance of patents to the State of Minnesota. It was contended that the suit was essentially one brought by the Indians against the State of Minnesota and that the United States was merely a nominal party as guardian for them. The Court stated that it must be conceded that if such were the case, it was not within the Court's original jurisdiction, citing *New Hampshire v. Louisiana*, and similar cases. But the Court pointed out that the United States not only was obligated as guardian of the Indians to recover property which had been wrongfully withdrawn from its guardianship, but was also under an obligation in the nature of a guarantor to see that the lands or their proceeds were disposed of in accordance with the treaty obligations.

Furthermore Section 2 of Article III of the Constitution does not expressly require that there be a controversy *with* the United States, but only that it be a party thereto. In this it differs from the language relating to controversies *between* a state and a citizen of another state.

In contrast with this case is that of *Kansas v. United States*, 204 U. S. 331, 51 L. Ed. 510, wherein the Supreme Court declined to entertain original jurisdiction.

In *Lankford v. Platte Iron Works Co.*, 235 U. S. 461, 59 L. Ed. 316, relied on by counsel for plaintiff State herein, it was held that a District Court of the United States could not issue a mandatory injunction in the nature of mandamus to compel the State Banking Board

to pay a claim or issue a certificate of indebtedness against the Bank Guaranty Fund. It was held that such fund was created by and belonged to the State and its administrative control thereof could not be subjected to judicial control of the Court. In the case at bar there is no fund created by and belonging to the State. There is simply a contractual liability entered into with the defunct bank and sought to be enforced for the sole benefit of the creditors of the bank.

From the foregoing adjudications it is obvious that in order for a state to maintain an original proceeding in this court against a citizen of another state the plaintiff State must have a property interest in the controversy, *i. e.*, in the proceeds of the cause of action sought to be enforced. Its interest must be other than a political governmental interest or one involving only its local municipal law or public policy. And this property interest must be asserted in its own right as beneficial owner thereof and not that of a mere trustee for private beneficiaries.

Cases against a state as defendant whether brought by another state or by the United States depend upon other clauses of the Constitution and involve entirely different principles. Except for the Federal Constitution a state cannot be made a defendant at all without its consent. The Constitution abolished international diplomatic negotiations or resort to force in controversies against a state and substituted therefor judicial proceedings in the Supreme Court of the United States. A private individual or corporation on the other hand could always be sued in courts of the jurisdiction to which he or it was

subject. Resort to diplomatic negotiation or force was unnecessary and inappropriate. There was no need to provide for original jurisdiction in the Supreme Court of suits against such private defendants. Such original jurisdiction was in such cases provided only when the controversy was one in which the plaintiff State had a real direct property interest in its own right and one transient in character which it would be entitled to enforce extra-territorially in the courts of a sister state.

IV.

The consequences of sustaining original jurisdiction in this case make clear the fact that it is not such as was contemplated in the framing of the Constitution.

The consequences of a ruling that the instant case is one properly within the original jurisdiction of this Court are somewhat startling to contemplate. It may be true that if the jurisdiction is properly invoked under the Constitution, practical objections may not be of controlling weight, but the Court may well pause before permitting itself to be converted into a *nisi prius* court by the simple device of a state assuming as a governmental function the obligation to enforce collection of the assets of insolvent banks, including enforcement of stockholders' double liability. If this jurisdiction is sustained it is not limited merely to suits to enforce the liability of stockholders, but the State of Oklahoma at the relation of its bank commissioner and any other state which may see fit to adopt the same legislative device, would be entitled to resort to original proceedings in the Supreme Court to

enforce collection of every bill and note or other obligation constituting an asset of the estate. In effect this Honorable Court could be converted into a mere forum for the collection of all the multitudinous claims of which a bank liquidator customarily finds himself possessed. There is no limitation with respect to the amount involved to the exercise of this Court's jurisdiction under Article III, Section 2 of the Constitution in cases where a state is a party.

In *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 32 L. Ed. 239, Mr. Justice Gray concluded the Court's opinion with the following significant statement:

"The original jurisdiction of this court is conferred by the Constitution, without limit of the amount in controversy, and Congress has never imposed (if indeed it could impose) any such limit. If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a state in her own courts against a citizen of another state, for the recovery of any sum of money, however small, by way of a fine for any offense, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the convention in framing, or of the people in adopting, the Federal Constitution."

Furthermore the contentions urged by plaintiff herein, if sound, are not limited to cases involved in the liquidation of the assets of defunct banks. The same

principles would apply to the liquidation of insurance companies and similar institutions of a character to make their functions a proper subject of state governmental regulation and control. All proceedings for the liquidation of and collection of the assets of insolvent banks and insurance companies throughout the United States could be lodged *en masse* in this forum by the simple device of the legislatures of the states passing enactments vesting title to such assets in the state and declaring it a part of its sovereign duty to enforce collection thereof.

The multitudinous defendants in such proceedings will be, as is the defendant Cook herein, entitled to trial by jury (Judicial Code, Sec. 235; 28 U. S. C. A., Sec. 343).

True, the impaneling of and trial by jury presents no insuperable obstacle to the exercise by this Court of its original jurisdiction if properly invoked. *Chisholm v. Georgia*, 2 Dall. 419. But jury trials of multitudinous claims involving, it may be, only a few dollars in each instance were, as Mr. Justice Gray pointed out in the *Pelican Insurance Company* case, hardly within the contemplation of the framers of the Constitution when they provided for the original jurisdiction of this Court to be restricted to the class of cases specified in Article III, Section 2 of the Constitution.

Furthermore, all of the statutory provisions restricting venue to judicial districts of the defendants' residence and the policy underlying such limitations of venue would be done away with. A liquidator of an insolvent

bank or life insurance company located in New York could in the name of that state hale a defendant residing, it might be, in California or Texas, before the bar of this Court to answer a demand of even less than \$100.00, in which case the cost and expense of appearing would greatly exceed the sum involved.

While there have been thousands of suits maintained in the courts of the country to enforce the double liability of stockholders in banks and other corporations, and although the Supreme Court of the United States has reviewed many of them in the exercise of its appellate jurisdiction, this is the first instance in which it has ever been contended that suits of such character could be instituted by original proceeding in the Supreme Court. If such jurisdiction exists, it is indeed surprising that this Court has not been heretofore deluged with multitudinous cases of this sort. Had it been, undoubtedly remedial action would have been taken by the Congress or by amendment to the Constitution, if need be, to prevent the conversion of this Court into a *nisi prius* court by the flood of such litigation. The fact that no case remotely similar to the case at bar has ever been entertained as an original proceeding by this Court since its inception is some indication that it was never contemplated that the jurisdiction here sought obtains.

The plaintiff herein naturally and properly first invoked the jurisdiction of the Circuit Court of Jackson County, Missouri, and instituted suit therein on the cause of action here involved. That jurisdiction has always been open and available to the plaintiff subject to what-

ever defenses the defendant may have. The plaintiff voluntarily dismissed its proceedings in the Jackson County Circuit Court, not because of any jurisdictional obstacles, but solely because it found itself unable under the rulings of that Court to prove its case. Under the liberal Missouri practice in such a situation, the plaintiff may elect to proceed until there is a definite adverse ruling by the court which would prevent the plaintiff obtaining judgment, in which case the plaintiff can submit to an involuntary nonsuit and thereafter appeal from the court's ruling. *Bank v. Gray*, 146 Mo. 568; *McClure v. Campbell*, 148 Mo. 96. Or the plaintiff, before such ruling can, as it did in this instance, take a voluntary nonsuit or dismiss without prejudice and file a new suit at any time within the period of the statute of limitations. It elected to do neither. This situation involves none of the considerations calling for the exercise of this Court's original jurisdiction as contemplated in the Constitution.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

— Original.—OCTOBER TERM, 1937.

The State of Oklahoma, upon the re- lation of Howard C. Johnson, Bank Commissioner, Plaintiff, <i>vs.</i> R. M. Cook, Defendant.	}	Motion for leave to file complaint.
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[May 23, 1938.]

Mr. Chief Justice HUGHES delivered the opinion of the Court.

The State of Oklahoma, upon the relation of its Bank Commissioner, asks leave to bring suit in this Court to enforce the statutory liability of a shareholder of a state bank which is in course of liquidation.

The statutes of Oklahoma provide that the shareholders of every bank organized under the state law "shall be additionally liable for the amount of stock owned". Okla. Stat. 1931, sec. 9130. The Bank Commissioner, when satisfied of the insolvency of a bank, may take possession of its assets and "proceed to wind up its affairs and enforce the personal liability of the stockholders". *Id.*, sec. 9172. That liability becomes due when the Bank Commissioner takes possession of the bank and his order finding the bank to be insolvent is conclusive evidence of that fact. *Id.*, sec. 9174. The Bank Commissioner is authorized to "prosecute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him" and such suits are to be brought "in the name of the State of Oklahoma, on the relation of the Bank Commissioner". If, after liquidation and payment in full of depositors and creditors, any assets remain in the hands of the Bank Commissioner, they revert to stockholders. *Id.*, sec. 9173.

The statutes further provide that "The State of Oklahoma, on the relation of the Bank Commissioner, shall be deemed to be the owner of all of the assets of failed banks in his hands for the use and benefit of the depositors and creditors of said bank". *Id.*, sec. 9179.

No costs are required to be paid by the State in any suit in which the State of Oklahoma, on the relation of the Bank Commissioner, is a party, and preference is directed to be given in the courts of the State to all matters pending in such suits. *Id.*

The proposed complaint alleges that in May, 1931, the Bank Commissioner took possession of the Osage Bank of Fairfax, Osage County, finding it to be insolvent, and proceeded to wind up its affairs and enforce the personal liability of its stockholders; that the defendant, R. M. Cook, was the owner of sixty-nine shares of the capital stock of the bank of the par value of \$100, and became liable to the State of Oklahoma, upon the relation of its Bank Commissioner, in the sum of \$6900, with interest; that the defendant has paid the sum of \$2300 in part satisfaction and that the balance is due; that the Bank Commissioner has liquidated all the assets of the bank except the claim here presented and certain other claims against other stockholders; that dividends have been paid to depositors and creditors amounting to ninety-one per cent. of their claims and that the enforcement of the statutory liability of the defendant is necessary to discharge the liabilities of the bank.

In answer to the rule to show cause why leave to bring this suit should not be granted, the proposed defendant contends that the cause of action is not within Article III, Section 2, Clause 2, of the Constitution providing for the original jurisdiction of this Court.

The purpose in creating the stockholder's liability, the authority conferred upon the Bank Commissioner to enforce it, and the relation of the State to its enforcement, are clearly set forth in the decisions of the Supreme Court of Oklahoma. In *State ex rel. Mothersead v. Kelly*, 141 Okla. 36, the court said:

"What is this stockholder's liability and for whose benefit is it created?

"It was designed solely for the benefit of creditors and constitutes a fund available only when the bank is insolvent and thus rendered unable to meet its liabilities in full. The corporation itself has no authority over the fund and cannot either compel its payment or by any act on its part release the stockholder therefrom. It amounts, for all practical purposes, to a reserve or trust fund, to be resorted to only in proceedings in liquidation, when necessary to meet the payment of obligations of the corporation.

It is limited to an amount equal to the par value of the stock held and owned by each stockholder and exists in favor of the creditors collectively, not separately, and in proportion to the amount of their respective claims against the corporation. . . ." (*Id.*, pp. 37, 38.)

The court added that "the Bank Commissioner alone is empowered by law to prosecute an action to enforce the stockholders' liability". *Id.*, p. 41. See also *American Exchange Bank v. Rowsey*, 143 Okla. 172, 173; *Griffin v. Brewer*, 167 Okla. 654, 655.

In *State ex rel. Murray v. Pure Oil Co.*, 169 Okla. 507, referring to the provision of the statute authorizing the Bank Commissioner to institute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him and providing that such suits shall be brought in the name of the State, on the relation of the Bank Commissioner, the court said:

"Since the state is the proper party plaintiff by virtue of the above statute, it may maintain the action regardless of whether it is the real party in interest or merely a nominal plaintiff for the use and benefit of depositors and creditors. An action may be maintained by one expressly authorized by statute even though that person is not in fact the real party in interest. Section 144, O. S. 1931. . . .

"The protection of depositors of insolvent state banks is a distinct economic policy of the state. . . . In so far as the object of this action is to further the established economic policy of the state, the state may be said to have a real interest created by its governmental policy, as distinguished from a mere nominal interest, even though the pecuniary benefits of the litigation, if ultimately successful, go to the depositors and creditors of the insolvent bank.

"The statute (section 9173, *supra*) which authorizes the state to be a party plaintiff names the Bank Commissioner as the proper officer to institute legal actions and carry out this economic policy.

"The nature of the powers vested by law in the Bank Commissioner have been many times considered by this court and their exclusive character recognized.

"It was the legislative intent that litigation of this character should be instituted and conducted under the direct supervision of the Bank Commissioner through the staff of legal assistants provided by law for that purpose, and not by the Governor, nor through independent action". *Id.*, pp. 509-512.

Again, in *Richison v. State ex rel. Barnett*, 176 Okla. 537, 539, the court observed:

"Under the provisions of article 6, chapter 40, O. S. 1931 (sec. 9168 *et seq.*) the state has assumed exclusive jurisdiction and control of the affairs of insolvent banking institutions. By operation of law the Bank Commissioner is the officer through which the state liquidates the assets and winds up the affairs of such institutions. While engaged in the performance of such statutory duties and functions the Bank Commissioner is performing duties for the benefit of certain members of the public who were depositors in such institution."

The state court has also held that the statute of limitations does not run against the State in an action to enforce the statutory liability of the stockholders. *State ex rel. Shull v. McLaughlin*, 159 Okla. 4. And the same rule applies to actions on promissory notes and other claims taken over by the Bank Commissioner as assets of an insolvent bank. *White v. State*, 94 Okla. 7; *Lever v. State*, 157 Okla. 162; *Richison v. State ex rel. Burnett*, *supra*.

May the State through its Bank Commissioner invoke our original jurisdiction to prosecute claims of this character for the benefit of creditors?

To bring a case within that jurisdiction, it is not enough that a State is plaintiff. *Florida v. Mellon*, 273 U. S. 12, 17. Nor is it enough that a State has acquired the legal title to a cause of action against the defendant, where the recovery is sought for the benefit of another who is the real party in interest. *New Hampshire v. Louisiana*, *New York v. Louisiana*, 108 U. S. 76. In those cases, provision was made by statutes of New Hampshire and New York for the assignment to the State of the obligations of another State. Thereupon it became the duty of the Attorney General of the State, if in his opinion the claim was a valid one, to bring suit in the name of the State in this Court in order to enforce collection. The money collected was to be held in trust, as stated, and to be paid over to the assignor of the claim. *Id.*, pp. 77, 79. The States, respectively, acquired title to bonds of the State of Louisiana and filed in this Court bills in equity in the name of the State to enforce recovery. The bills were dismissed. The fact that the effort was made to use the name of the complainant States in order to evade the application of the Eleventh Amendment was undoubtedly a controlling consideration, but that consideration derived

its force from the fact that the State was not seeking a recovery in its own interest, as distinguished from the rights and interests of the individuals who were the real beneficiaries.

The underlying point of the decision was that in determining the scope of our original jurisdiction under Clause 2 of Section 2 of Article III of the Constitution, we must look beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest. So, when it appeared in a later case that a State, invoking the original jurisdiction of this Court to enforce the bonds of another State, was the absolute owner of the bonds and was prosecuting the claim upon its own behalf, this Court took jurisdiction. *South Dakota v. North Carolina*, 192 U. S. 286. There the Court found that, while the State of South Dakota acquired by gift the bonds of North Carolina, there could not be "any question respecting the title of South Dakota". They were not held, the Court said, by the State as representative of individual owners as in the case of *New Hampshire v. Louisiana*, 108 U. S. 76, and the motive which induced the transaction was not deemed to "affect its validity or the question of jurisdiction". The case was thus one "directly affecting the property rights and interests of a State". *Id.*, pp. 314, 318.

In determining whether the State is entitled to avail itself of the original jurisdiction of this Court in a matter that is justiciable (see *Massachusetts v. Mellon*, 262 U. S. 447, 485), the interests of the State are not deemed to be confined to those of a strictly proprietary character but embrace its "quasi-sovereign" interests which are "independent of and behind the titles of its citizens, in all the earth and air within its domain". *Georgia v. Tennessee Copper Company*, 206 U. S. 230, 237. Thus, we have held that a State may sue to restrain the diversion of water from an interstate stream (*Kansas v. Colorado*, 206 U. S. 46, 95, 96) or an interference with the flow of natural gas in interstate commerce (*Pennsylvania v. West Virginia*, 262 U. S. 553, 592); or to prevent injuries through the pollution of streams or the poisoning of the air by the generation of noxious gases destructive of crops and forests, whether the injury be due to the action of another State or of individuals (*Missouri v. Illinois*, 180 U. S. 208, 200 U. S. 496; *Georgia v. Tennessee Copper Company*, *supra*; *North Da-*

kota v. Minnesota, 263 U. S. 365, 373, 374; *Wisconsin v. Illinois*, 278 U. S. 367, 281 U. S. 179).

But this principle does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy. In *Kansas v. United States*, 204 U. S. 331, the State asked leave to file a bill of complaint against the United States and others, seeking a decree adjudging the State to be the owner, as trustee for a railway company, of certain sections of land to the extent of a grant along the line of the railroad through the Creek Nation in the Indian Territory. The Court said that it appeared upon the face of the bill that the State was only nominally a party, that the real party in interest was the railroad company, and that our original jurisdiction "could not be maintained". *Id.*, pp. 340, 341. The Court also held that the United States was the real party in interest as defendant and could not be sued without its consent, but the other question was presented and passed upon.

In *Oklahoma v. Atchison, Topeka & Santa Fe Railway Co.*, 220 U. S. 277, the State sought to maintain an action in this Court against the carrier to restrain it from charging unreasonable rates within Oklahoma. Setting forth the congressional grant under which the railway in question was operated and insisting that the Company was not entitled to charge the inhabitants of Oklahoma a greater freight rate for the transportation of certain commodities than that authorized for similar service in Kansas, the State alleged its interest in the development of its communities and in the success of its industries, and the menace to the future of the State through what was deemed to be a violation of the conditions of the grant. But the Court pointed out that the State was not seeking to protect a direct interest of its own in the transportation of the commodities in question, but was endeavoring to compel the railway company to respect the rights of the shippers of these commodities. *Id.*, pp. 286, 287. The bill was dismissed. The Court summarized its conclusion in these words:

"We are of the opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit 'in which a State shall be a party' are not to be interpreted as conferring

such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers, generally". *Id.*, p. 289.

See, also, *Louisiana v. Texas*, 176 U. S. 1.

In the instant case, the State has taken the legal title to the assets of the insolvent bank which is being liquidated and to the claims against stockholders by reason of their statutory liability. But recovery is sought solely for the benefit of the depositors and creditors of the bank. *State ex rel. Motherhead v. Kelly, supra*; *State ex rel. Murray v. Pure Oil Co., supra*; *Richison v. State ex rel. Barnett, supra*. Constituting the State a virtual trustee for the benefit of the creditors of the bank did not alter the essential quality of the rights asserted or avail to confer jurisdiction upon this Court to entertain a suit for their enforcement. *New Hampshire v. Louisiana*; *New York v. Louisiana, supra*; *Kansas v. United States, supra*; *Oklahoma v. Atchison, Topeka & Santa Fe R. R. Co., supra*. The taking of the legal title by the State is a mere expedient for the purpose of collection.

It will be noted that the State not only undertakes to enforce the statutory liability of stockholders but, as the State takes title to all the assets of the insolvent bank, suits upon promissory notes and various claims of the bank in the course of the liquidation are to be brought in the name of the State acting through its Bank Commissioner. The declared policy and asserted economic interest of the State attach as well to the prosecution of all such suits. If the contention of the State were accepted, it would follow that suits upon claims of the bank against citizens of other States could be brought in this Court. Many States have statutory provisions for the liquidation through state officers of insolvent banks, trust companies, insurance companies, etc., and if, by the simple expedient of providing that the title to the assets of such institutions should vest in the State and that suits in the course of liquidation should be prosecuted in the name of the State, resort to our original jurisdiction were permitted, the enormous burden which would thereby be imposed upon this Court can readily be imagined,—a burden foreign to the purpose of the constitutional provision. These considerations emphasize the importance of

strict adherence to the governing principle that the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest.

The motion for leave to file complaint is denied.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.